No. (1)

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

THE MEDICAL SOCIETY OF NEW JERSEY; and W.C., M.D.,

Petitioners,

—v.—

BERNARD ROBINS, M.D., individually and in his official capacity as President of the New Jersey State Board of Medical Examiners; ELEANOR BERNSTEIN, individually and in her official capacity as a Deputy Attorney General of the State of New Jersey; THE NEW JERSEY BOARD OF MEDICAL EXAMINERS; THE DIVISION OF CONSUMER AFFAIRS OF THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY; THE DIVISION OF LAW OF THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY; THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY; THE STATE OF NEW JERSEY; and "JOHN & JANE DOES 1-20", whose real identities are at this time unknown to the plaintiffs,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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January 3, 2000

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QUESTIONS PRESENTED

1) Did the New Jersey Supreme Court err by failing to reverse the Appellate Division's finding that the case was moot?

2) Did the New Jersey Supreme Court err by failing to hold *N.J.S.A.* 45:1-18 unconstitutional?

3) Did the New Jersey Supreme Court err in failing to correct the Appellate Division's application of the wrong standard in analyzing the administrative Demand for Inspection at issue in this case?

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STATEMENT OF JURISDICTION

This Court has jurisdiction to consider this petition by way of writ of certiorari, and to decide this matter, pursuant to 28 U.S.C. § 1257(a), in that the petitioners seek review of a final judgment or decree[1] rendered by the Supreme Court of New Jersey, the highest court of that State in which a decision could be had, in which the validity of a statute of the State of New Jersey is drawn into question on the grounds of its being repugnant to the Constitution of the United States, and in which a title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

N.J.S.A. 45:1-18 is unconstitutional, as it authorizes and permits warrantless searches of physicians' offices by administrative fiat, without opportunity for prior judicial review. The petitioner was subjected to a warrantless search of her medical office without opportunity for prior judicial review, and by being coerced into abandoning her Constitutional rights by reason of the State of New Jersey's imposition of its "duty to cooperate" regulation, in violation of her rights under the Fourth and Fourteenth Amendments to the Constitution.

STATEMENT OF THE MATTER INVOLVED

The petitioner, the Medical Society of New Jersey ("MSNJ"), is our nation's first state society of physicians. Founded in 1766, the MSNJ is the primary organization of physicians in New Jersey. Approximately nine thousand five hundred physi-

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[1] With respect to the serious Constitutional issues raised by this Petition, the decree of the Supreme Court of New Jersey denying certification was a final judgment. In leaving the Appellate Division's rulings in place, the New Jersey Supreme Court implicitly endorsed that portion of the lower court's ruling remanding a statutory 28 U.S.C. § 1983 claim which the Appellate Division found "technically" remained pending, while also pointing out "the limited ability to proceed against State officials under § 1983." *See* Appendix, Appellate Division opinion at 9-10.

cians hold individual memberships in the MSNJ. For more than 230 years, the Medical Society of New Jersey has been the state's leading voice in the health care field. The MSNJ's mission is to promote the quality of health care and health services for all citizens of the state and to supply leadership and assistance to its physician members. To fulfill this mission, the MSNJ regularly participates in important issues in the judicial, legislative and regulatory arenas.

The MSNJ has played a leadership role concerning contemporary legal and ethical issues confronting modern medical practice and has historically helped to shape and implement landmark judicial and legislative initiatives concerning the impact of juridical issues upon the practice of medicine. Through its Committee on Biomedical Ethics, the MSNJ has developed policies and positions addressing the roles of physicians, patients and hospitals and their concomitant rights, duties and obligations to the larger society physicians are privileged to serve.

The petitioner, W.C., M.D. (hereinafter, "W.C."), is a physician duly licensed by the State of New Jersey to practice medicine and surgery. She is a member of the MSNJ.

This petition invites this Court to reestablish the fundamental right of physicians and their patients to be free from overbroad, unannounced, warrantless searches of physicians' offices. The New Jersey Board of Medical Examiners (the "Board") and the Attorney General of New Jersey (the "AG") have conducted, and continue to conduct, such searches, without prior judicial review, encompassing patient records, books, private belongings, privileged materials and other documents. Such actions are in clear violation of the guarantees embodied in the Fourth and Fourteenth Amendments to the Constitution of the United States.

This case involves a warrantless search of the offices of the petitioner, W.C., through the vehicle of a self-styled "Administrative Demand for Inspection." W.C., upon advice of coun-

sel, initially objected to the scope of the inspection and sought judicial review.

The relevant facts, in brief, are as follows. Sometime in 1995, an indigent patient complained to the Board that Dr. W.C. had provided her with a free sample of medication which had stamped on its package a precedent expiration date. The drug was Voltarin®, a non-scheduled, non-controlled drug similar to the over-the-counter pain relievers Aleve® and Advil®.

In 1997, the Board of Medical Examiners determined to take no disciplinary action against W.C. for providing this free sample to an impecunious patient. Indeed, at that time, there was no prohibition against providing outdated samples, and the scientific literature is replete with articles suggesting that most medications are safe and effective for as many as ten years beyond their manufacturer-stated expiration dates.

Despite these facts, the Board ordered its Enforcement Bureau to conduct "an unannounced cost effective inspection of W.C.'s office to check for outdated medications." This action was, by definition, without probable cause, as the Board had already determined that Dr. W.C. had not violated the Medical Practices Act or other law. Moreover, there is no known or reported case of patient injury resulting from use of this, or any similar medication, beyond its expiration date.

Compounding the Board's improper action, the Enforcement Bureau investigators determined that they would not follow the Board's express directive limiting the search to "a cost effective inspection of outdated medications." Rather, pursuant to an "unwritten policy," investigators from the Enforcement Bureau discussed the matter with one of the less senior Deputy Attorneys General assigned to the Board, Eleanor Bernstein, Esq.

They had Ms. Bernstein execute a "standard" form Administrative Demand for Inspection of Professional Premises that they use "most of the time." This was done with the understanding that the investigator was to perform a complete inspection of every item in the doctor's office, even though the Board specifically directed that the search be limited to "outdated medications."

An analysis of the Demand signed by DAG Bernstein demonstrates that it provided for a search of everything contained within W.C.'s offices, with one exception—outdated medications. Specifically, the Demand for Inspection provided that:

> PETER VERNIERO, Attorney General of New Jersey, by Eleanor G. Bernstein, Deputy Attorney General, hereby demands to inspect, videotape, and photograph the premises and to inspect the licenses of all licensed personnel, job descriptions of all employees, the records, books, appointment books, documents, and billing records, and equipment maintained in the regular course of the licensed practice at the identified location.

The search was initially to be conducted immediately upon service, without prior notice or opportunity to object. No limitations, whatsoever, were placed upon the investigators' discretion. By admission, there was no reason why the Demand for Inspection could not have been limited to an inspection of all medications maintained at the premises.[2]

The over-breadth of the Demand and total lack of any limitation on the search was conceded by the investigator who was to conduct the search. She testified that she understood that she was authorized to search all equipment and that she interpreted the word "equipment" to be so broad as to encompass all books, records, and anything else used in the regular course of the practice of medicine.

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[2] W.C. never objected to an inspection of the medications she maintains on her premises.

When the defendants' investigators arrived, W.C. gave them total freedom to inspect the entirety of her office premises and everything within the offices that was in plain view, including her equipment. The inspectors never asked W.C. for permission to inspect the medications she maintained. The investigators were able to inspect the overall appearance of the premises, medications, cleaning agents, the manner in which patient records were stored and maintained, and the equipment used by the physician. W.C. did, however, on the advice of counsel, resist the investigators' demand to rummage through her personal effects and rifle through her desk, cabinets, files and patient records.

The deputy attorney general who signed the Demand for Inspection took exception to this reasonable limitation imposed upon her investigators. However, instead of seeking judicial review and enforcement of her Demand before seeking to impose disciplinary sanctions, as mandated by the United States Supreme Court, she sought "an end-run" around W.C.'s constitutionally mandated right to prior judicial review by seeking enforcement and sanctions directly from the Board. She did so by bringing an Order to Show Cause before the defendant Board, asking it to take disciplinary action against W.C. on the grounds she had refused, upon advice of counsel, to comply immediately with the deputy's facially unconstitutional Demand for Inspection. The deputy also asked the Board to impose not only punitive sanctions for W.C.'s initial refusal to fully comply with the deputy's unlawful demand, but continuing sanctions, including license suspension, until W.C. agreed to succumb to that Demand.

The Board, of course, is not a judicial body, but rather an administrative agency within and under the direction of the Department of Law and Public Safety, as part of the Division of Consumer Affairs. The Department of Law and Public Safety is headed by the Attorney General of New Jersey. It is that same Attorney General who, through his deputy, issued the original Demand for Inspection, and then attempted to

enforce it through his field investigators, working in the Enforcement Bureau. The Enforcement Bureau is also under the Attorney General's jurisdiction as part of the Division of Consumer Affairs.

The Attorney General then sought enforcement and sanctions before the Board, which is, likewise, within his control and jurisdiction, and to which he provides legal counsel and advice. As such, the only review of this matter has been by way of a demand by the Attorney General that an administrative Board, under the direct control and influence of his Office, enforce his Office's own abusive investigative scheme, and sanction the physician for her failure to abide his Office's arbitrary and capricious demands.[3]

During a hearing on the Attorney General's Order to Show Cause before the Board, the clear overreaching of the Demand for Investigation was confirmed by the supervisor of investigations who admitted that there was no nexus between books, records, appointment books, documents and billing records, and outdated medication; no nexus between the licenses to be inspected and outdated medications; no nexus between job descriptions and outdated medications; and no nexus between maintenance of equipment and outdated medications. Nor could the defendants enunciate any public policy which precludes a physician from maintaining on premises outdated samples of medication.

On December 10, 1997 the Board rubber-stamped the Attorney General's demands. In light of the Board's prior direction that the inspection be a "cost effective" inspection limited to outdated medications, the Board determined that it had, in fact, previously authorized the scope of the search set forth in

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[3] The defendant Board is a sub-component of the defendant Division of Consumer Affairs; the defendant Division of Consumer Affairs is a sub-component of defendant Department of Law and Public Safety; and the Attorney General is the cabinet level head of the Department of Law and Public Safety and to bring it full circle, the prosecutor of W.C. before the defendant Board.

the Attorney General's Demand for Inspection of W.C.'s office. The "Board Order" further "found" that W.C.'s failure to permit a full inspection of the equipment and records in her office, including but not limited to medications and records maintained in drawers and cabinets in her office, violated its "duty to cooperate" regulation, *N.J.A.C.* 13:45-C-1.3.[4]

The Board ordered W.C. to cooperate fully with an inspection no later than January 8, 1998. The Board ordered that the inspection would include items located in the drawers and cabinets in her office. The Board also directed W.C. to pay a monetary penalty of $1,000 for her prior violation of her duty to cooperate, but ordered that penalty stayed if the inspection were permitted by January 8, 1998.

The Board's findings are contained in a "Final Decision and Order" purportedly executed by the President of the Board on Christmas Day, December 25, 1997. This "Final Decision and Order" is twenty-three pages in length. Its language and contents are that of the deputy Attorney General who composed it. It was never seen or approved by the Board, before its filing. As such, the "Final Order" is nothing more than a document prepared by the very party seeking the constitutionally prohibited power to compel, through threat of license suspension, warrantless administrative searches, without the Constitutionally guaranteed right to prior judicial review.

The plaintiffs then made application to the Superior Court of New Jersey, Chancery Division, for an order enjoining the Board's unlawful search demand. The Chancery Division, at the urging of the defendants, without adjudicating the reasonableness of the Demand for Inspection before enforcement, determined that jurisdiction was in the Appellate Division of the Superior Court and transferred jurisdiction.

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[4] All adverse findings by the Board are reported, by law, to the National Practitioner Data Bank. Any adverse action report, even a stayed fine, can result in the inability of a physician to obtain or maintain hospital privileges or managed care contracts. As such, serious repercussions can be anticipated from even "stayed" actions.

The Appellate Division, again with the urging of the defendants, refused to provide emergent relief, thus refusing to adjudicate the reasonableness of the Board's search demand. The plaintiffs then sought review by the Supreme Court of New Jersey. That Court, yet again with the urging of the defendants, similarly refused to adjudicate the reasonableness of the Board's search demand.

On January 28, 1998, the Board issued an "Order Amending Date" ordering a search of identical scope as that originally demanded, to be conducted on or before February 6, 1998.

Efforts to obtain judicial review by the United States District Court for the District of New Jersey were then made on February 4, 1998. The Federal Court, on that date, refused to address the merits of the case, accepting the argument of the defendants that it lacked subject matter jurisdiction because the Superior Court, Appellate Division, could have decided the merits of this case upon its review.

On February 6, 1998, three agents of the defendants conducted a search of W.C.'s office, opening virtually every door, drawer and cabinet of her office, including her desk drawers, and otherwise inspecting her offices and equipment, including her kitchen sink, thus invading her Constitutional rights and the privacy rights of her patients, in the process.

That inspection was videotaped by both the petitioners and defendants. The defendants have strenuously objected to having a court view the videotapes, which demonstrate the nature and extent of the invasion upon W.C. and her office. The very fact that the defendants have collectively determined to prevent any court review of the videotapes speaks volumes. Were the Court provided the opportunity to view these tapes, it would, no doubt, be offended by the breach of privacy and overreaching of the defendants.

In a decision issued and filed on June 1, 1999, 5a, the Appellate Division ruled that W.C.'s action was moot, on the grounds that she had complied with the demand and that the defendant Board had, therefore, agreed to impose no sanctions. Despite its finding of mootness, the Appellate Division nevertheless saw fit to opine upon the merits of the case. In its rationale, however, the Appellate Division failed to address the central issues in the appeal; the overbreadth of *N.J.S.A.* 45:1-18 and the fact that there is still no recourse to obtain judicial review of an overbroad administrative Demand for Inspection.

By way of petition for certification, the MSNJ and W.C. sought review of the Appellate Division's decision by the Supreme Court of New Jersey. The defendants, as well, filed a cross-petition for certification. By Orders dated October 6, 1999, the Supreme Court of New Jersey denied both petitions. 1a-4a.

ERRORS COMPLAINED OF, REASONS WHY CERTIORARI SHOULD BE GRANTED AND COMMENTS UPON THE DECISION BELOW.

POINT I

THE NEW JERSEY SUPREME COURT ERRED IN FAILING TO REVERSE THE APPELLATE DIVISION'S HOLDING THAT THE MATTER WAS MOOT.

Based upon the fact that Dr. W.C. had allowed the overbroad search of her office to go forward, and upon a finding that the Board had therefore decided to not impose sanctions against her, the Appellate Division ruled that the appeal was moot. 6a-7a. This decision ignored fundamental constitutional concerns raised by the plaintiffs. The inaction on the part of the New Jersey Supreme Court simply leaves the Appellate Division's infirm ruling in place.

The Appellate Division did not even address the unconstitutional, strong-arm tactics employed by the defendants. The search in question went forward not on the basis of any voluntary consent given by Dr. W.C. Instead, she was given an ultimatum; either permit the search on or before February 6, 1998, or lose her license to practice medicine on the basis of her "failure to cooperate." Despite repeated pleas for court intervention to rule upon the permissible limits of any search, she was denied any relief and was forced to make a Hobson's choice of submitting to an illegal search or possibly losing her livelihood.

In analyzing this issue, it is important to recall the circumstances surrounding the administrative Demand for Inspection. At the time the Demand was issued, there was no prohibition against a physician dispensing, or maintaining, free samples of drugs which had passed their expiration dates. The Board had, in fact, specifically found that Dr. W.C.'s actions in this regard did not violate the Medical Practices

Act or in any way constitute wrongful conduct. Furthermore, the oppressive and overbroad administrative Demand for Inspection authorized the search of Dr. W.C.'s office for anything and everything except outdated or expired drugs. The Appellate Division sidestepped these deep constitutional concerns with a ruling which essentially amounts to "no harm, no foul."

The Appellate Division goes on to state that this problem will not arise in the future, as a new regulation, *N.J.A.C.* 13:35- 7.5(b), now specifically provides that a "practitioner shall not maintain" outdated medication, and that *N.J.S.A.* 45:1-18 expressly authorizes administrative searches based upon violations of specific regulations. 7a-8a. Of course, such provision in no way protects against a reoccurrence of the abusive conduct which took place in this case.

There still remains no avenue for judicial review of an administrative Demand for Inspection which, as in this case, goes far beyond the bounds permitted by regulation, statute or constitutional law. Under the Appellate Division's ruling, the defendants remain free to use their extortionate tactics to force compliance with demands for illegal searches, not subject to any form of prior judicial review.

The Appellate Division's holding of mootness also ignores the serious impact which even "stayed" administrative penalties, or a "temporarily" suspended license, may have on a medical practitioner's career. Any adverse action report, even a stayed fine, can result in the inability of a physician to obtain or maintain hospital privileges or managed care contracts. As such, serious repercussions can be anticipated from even "stayed" or "temporary" actions. Moreover, W.C. is now considered by the Board to be a "first offender." Were she to engage in any further wrongdoing, she would be subject to enhanced penalties as a "repeat offender."

Under the Appellate Division's handling of this case, the judicial system stood idly by while the government engaged

in the worst sort of coercion of a private citizen, and then declared the case "moot" after the citizen caved in to irresistible governmental pressure. This is patently unfair. While the Government may seek to invoke the aid of the court in enforcing its considerable powers against a citizen, the citizen is deprived of a concomitant right to seek the court's protection from an overreaching government. This cannot be the present state of the law.

POINT II

THE NEW JERSEY SUPREME COURT ERRED BY FAILING TO HOLD *N.J.S.A.* 45:1-18 UNCONSTITUTIONAL.

The Board's statutory authority to conduct investigations, either directly or through the Attorney General, is set forth at *N.J.S.A.* 45:1-18. Pursuant to *N.J.S.A.* 45:1-15, that statute is applicable not only to the Board, but to all boards and all professions or occupations regulated throughout New Jersey, including cosmetologists, morticians and plumbers. None of these Boards, including the Board of Medical Examiners, has promulgated any rules governing the frequency or timing of warrantless inspections or the procedures that inspectors must follow in order to conduct a warrantless inspection. The Fourth Amendment to the Constitution of the United States restricts the ability to conduct legislatively authorized warrantless inspections to carefully defined classes of cases, in accordance with clearly delineated rules. These restrictions are applicable to the States through the Fourteenth Amendment. *Ker v. California*, 374 U.S. 23, 30 (1963).

This Court has considered the constitutionality of warrantless inspections. In *Camera v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967), the Court found that a governing principle of the fundamental purpose of the Fourth Amendment, justified by both history and by

current experience, is that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." 387 U.S. at 528-29.

In *Camera*'s companion case, *See v. City of Seattle*, 387 U.S. 541 (1967), the Court stated that in order to satisfy the requirements of the Fourth Amendment, an administrative subpoena must be sufficiently specific and limited in scope to a relevant purpose, and a subpoenaed party is entitled to judicial review of the subpoena prior to being subject to penalties for failure to comply. 387 U.S. at 545-6.

The United States Supreme Court has recognized narrow circumstances where warrantless searches are permissible in connection with a narrowly drawn legislative scheme targeting specific industries. *See Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor dealers); *United States v. Biswell*, 406 U.S. 311 (1972) (firearms dealers); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mining industry); *New York v. Burger*, 482 U.S. 691 (1987) (automobile dismantlers). In *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) the Court struck down as unconstitutional a legislative inspection scheme in OSHA, which is nearly identical to the regulatory scheme set out at *N.J.S.A.* 45:1-18.

In conclusion, the only time the Constitution does not compel a warrant is when Congress or the State Legislature has reasonably determined that warrantless searches are necessary to further a regulatory scheme involving an inherently notorious industry. Then, and only then, government may impose warrantless searches but only if its regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes and where safeguards exist to challenge the attempted search prior to enforcement.

In blatant contravention of these requirements, the Attorney General demanded the opportunity to immediately inspect the entire contents of Dr. W.C.'s office, with no right to obtain prior judicial review of the reasonableness of that demand. It then fined W.C. for refusing to comply, while simultaneously and aggressively thwarting any opportunity for judicial review. The Appellate Division erred in failing to find *N.J.S.A.* 45:1-18 unconstitutional, and the New Jersey Supreme Court erred in failing to grant certification and remedy the intermediate appellate court's error.

POINT III

THE NEW JERSEY SUPREME COURT ERRED IN FAILING TO CORRECT THE APPELLATE DIVISION'S APPLICATION OF THE INCORRECT CONSTITUTIONAL STANDARD IN ANALYZING THE ADMINISTRATIVE DEMAND FOR INSPECTION.

Finally, the New Jersey Supreme Court erred in upholding the Appellate Division's misconstruction of this Court's cases dealing with "closely regulated" industries. In so doing, the courts below engaged in circular reasoning:

> We read nothing in *Burger* [*New York v. Burger*, 482 U.S. 691 (1987)] or the other United States Supreme Court cases which prohibit the legislature from delegating to an administrative agency the authority to adopt regulations which satisfy the constitutional three prong test announced in *Burger*.

11a. While this is no doubt true, as far as it goes, it begs the question at issue in this case.

Of course, if the administrative Demand for Inspection in this case did, in fact, satisfy the "constitutional three prong test announced in *Burger*," this action would have been

unnecessary, and the defendants would not have resisted so strenuously the plaintiffs' efforts to have it considered by a court.

The problem in this case was that the administrative Demand for Inspection did not satisfy the "constitutional three prong test announced in *Burger*." Under the Appellate Division's ruling, as endorsed, *sub silentio*, by the New Jersey Supreme Court, no court can pass on the question of whether a Demand does so satisfy the test mandated by the this Court. Under the Appellate Division's conceptualization, since the legislature enacted the enabling statutes and the Attorney General issued his Demand pursuant to those statutes, each and every demand must be presumptively, irrebuttably and *per se* constitutional and valid.

This, of course, cannot be so. The undisputed facts of this case show that this is not so. Governmental enforcement agencies do make mistakes, do overreach and do act improperly and coercively. When this happens, it is the sacred responsibility and duty of the courts to intervene and protect the constitutional rights of individual citizens, before those citizens are forced to chose between forfeiture of their constitutional rights or potential destruction of their professional careers.

CONCLUSION

For the foregoing reasons, The Medical Society of New Jersey and Dr. W.C. respectfully urge that this Court grant certiorari and correct the decision of the New Jersey Supreme Court by reversing the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

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Dated: Bridgewater, New Jersey
January 3, 2000

SUPREME COURT OF NEW JERSEY
C-169 September Term 1999
48,119

Filed October 7, 1999

MEDICAL SOCIETY OF NEW JERSEY, et al.,

Plaintiffs-Petitioners,

—v.—

BERNARD ROBINS, M.D., et al.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2917-97 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 6th day of October, 1999.

STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT
OF NEW JERSEY

SUPREME COURT OF NEW JERSEY
C-170 September Term 1999
48,119

Filed October 7, 1999

MEDICAL SOCIETY OF NEW JERSEY, et al.,

Plaintiffs-Cross-Respondents,

—v.—

BERNARD ROBINS, M.D., et al.,

Defendants,

—and—

NEW JERSEY BOARD OF MEDICAL EXAMINERS, et al.,

Defendants-Cross-Petitioners.

ON CROSS-PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A cross-petition for certification of the judgment in A-2917-97 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the cross-petition for certification is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 6th day of October, 1999.

STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT
OF NEW JERSEY

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2917-97T5

Filed June 1, 1999

THE MEDICAL SOCIETY OF NEW JERSEY, and W.C., M.D.,

Plaintiffs-Appellants,

—v.—

BERNARD ROBINS, M.D., individually and in his official capacity as President of the New Jersey State Board of Medical Examiners; ELEANOR BERNSTEIN, individually and in her official capacity as a Deputy Attorney General of the State of New Jersey; THE NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS; THE DIVISION OF CONSUMER AFFAIRS OF THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY; THE DIVISION OF LAW OF THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY; THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY; THE STATE OF NEW JERSEY; and "JOHN AND JANE DOES 1-20" whose real identities are at this time unknown to the plaintiffs,

Defendants-Respondents.

Argued February 24, 1999 – Decided June 1, 1999.

Before Judges Stern, Landau and Braithwaite.

On appeal from the Superior Court of New Jersey, Chancery Division, Essex County.

Steven I. Kern argued the cause for appellants (Kern Augustine Conroy & Schoppmann, attorneys; Mr. Kern, of counsel; Mr. Kern, P.W. Armstrong and Bonnie M. Weir, on the briefs).

Douglas J. Harper, Deputy Attorney General, argued the cause for respondents (Peter Verniero, Attorney General, attorney; Jeffrey Burstein, Senior Deputy Attorney General, of counsel; Mr. Harper and Eleanor G. Bernstein, Deputy Attorney General, on the brief).

The opinion of the court was delivered by

STERN, P.J.A.D.

This case questions the constitutionality of an administrative "demand" to "inspect" the office of W.C., a medical doctor, as a result of information received by the Board of Medical Examiners (Board) that the doctor was distributing outdated medication. The written "Demand for Inspection of Professional Premises" was issued by the Attorney General on September 27, 1997 after the Board requested that the inspection be conducted. It authorized an inspection of W.C.'s office and records by the Enforcement Bureau of the Division of Consumer Affairs "during business hours." W.C. did not honor the demand, however, and plaintiffs' efforts to challenge it before the Board were unsuccessful. The Board's final decision and order, filed December 26, 1997, imposed sanctions for violation of its duty to cooperate regulation. The sanctions were "stayed" to permit compliance;[1] plaintiffs'

[1] In its "final decision and order" of December 25, 1997 the Board ordered that:

> Dr. W.C. shall pay a monetary penalty of $1,000 for her violation of the Duty to Cooperate regulation. This penalty will be stayed in its entirety if access to the premises, licenses, job descriptions, record, books, appointment books, documents, billing records and equipment as required by the Demand [for Inspection of Professional Premises issued by the Attorney General on September 25,1997] and by this Order is afforded within 30 days of the date of the oral announcement of this order on the record [which was on December 10, 1997].

efforts to obtain a judicial stay were denied, and on January 28, 1998, the Board amended its order to require that W.C. "shall fully cooperate with" the inspection "[n]o later than February 6, 1998."

We dismiss this appeal as moot. We were advised at oral argument that the Board of Medical Examiners vacated the $1,000 penalty imposed because Dr. W.C. complied with the administrative demand on February 6, 1998. The defendants have also indicated to us that no sanctions would be imposed. That being so and there being no potential evidence to suppress, we see no justiciable controversy for resolution in this matter transferred to us prior to plaintiffs' compliance with the demand. *See Oxfeld v. New Jersey Bd. of Educ.*, 68 *N.J.* 301, 303-04 (1975); *Cinque v. New Jersey Dept. of Corrections*, 261 *N.J. Super.* 242, 243 (App. Div. 1993).[2]

In light of the arguments of the parties and the general "public importance" of the subject matter, *Oxfeld*, *supra*, 68 *N.J.* at 303, however, we have no hesitation in adding the following.

The constitutional issue posed by this case has, in our view, been substantially resolved for future similar circumstances by the adoption of *N.J.A.C.* 13:35-7.5(b) after the administrative demand was initially made.[3] That regulation specifi-

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[2] The Chancery Division properly transferred the case challenging the Board's action to this court, *see, e.g., In re Valley Road Sewerage Co.*, 295 *N.J. Super.* 278 (App. Div. 1996), *aff'd*, 154 *N.J.* 224 (1998), prior to the February 6, 1998 administrative inspection. This is a different case than *In re Vornado, Inc.*, 159 *N.J. Super.* 32 (App. Div.), *certif. denied*, 77 *N.J.* 489 (1978), relied upon by plaintiffs, which involved an enforcement proceeding. *See also Pascucci v. Vaggot*, 71 *N.J.* 40, 52-53 (1976); *In Re A-1 Jersey Moving & Storage, Inc.*, 309 *N.J. Super.* 33, 42 (App. Div. 1988); *R.* 2:2-3(a)(2); *R.* 1:13-4(a). In light of our disposition, we have no need to consider any issue of the Medical Society's standing to proceed as a plaintiff. *In re Martin*, 90 *N.J.* 295, 308-10 (1982).

[3] The parties agree that the regulation was not in effect at the time the demand issued and the 1997 searches were attempted. The regulation was apparently adopted effective November 3, 1997. In any event, it was not referred to in the demand or in the Board's opinion as a basis for upholding the demand.

cally provides that "[a] practitioner shall not maintain" outdated medication, and *N.J.S.A.* 45:1-18 expressly authorizes an administrative search based on finding a violation of a specific regulation. *See also N.J.S.A.* 45:1-14, -15, -17 (placing the Board of Medical Examiners within the Division of Consumer Affairs and giving the Attorney General enforcement powers).

There can be no doubt that the medical profession is highly regulated. *See, e.g., In re Polk*, 90 *N.J.* 550, 566 (1982); *N.J.S.A.* 45:9-1 *et seq.*; *N.J.A.C.* 13:35-1 *et seq.* Licensure to practice medicine is required, follows extensive education, and is subject to the rules and regulations of the Board of Medical Examiners. *Id.* Thus, an administrative search as part of a comprehensive statutory scheme to assure compliance with specific regulations governing the profession is authorized by *New York v. Burger*, 482 *U.S.* 691, 107 *S. Ct.* 2636, 96 *L. Ed.*2d 601 (1987).

> An expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home. *See Donovan v. Dewey*, 452 *U.S.* 594, 598-99, 101 *S. Ct.* 2534, 2537-38, 69 *L. Ed.*2d 262, 268-69 (1981). This expectation is particularly attenuated in commercial property employed in "closely regulated" industries. The Court observed in *Marshall v. Barlow's, Inc.*: "Certain industries have such a history of government oversight that no reasonable expectation of privacy, *see Katz v. United States*, 389 U.S. 347, 351-52, [88 *S. Ct.* 507, 511-12, 19 *L. Ed.*2d 576] (1967), could exist for a proprietor over the stock of such an enterprise." 436 *U.S.* 307, 313, 98 *S. Ct.* 1816, 1821, 56 *L. Ed.*2d 305, 312 (1978).
>
> [*New York v. Burger, supra,* 482 *U.S.* at 700, 107 *S. Ct.* at 2642, 96 *L. Ed.*2d at 612.]

Hence, there is a "reduced expectation of privacy by the owner of commercial premises in a 'closely regulated' industry." *Id.* at 701, 107 *S. Ct.* at 2643, 96 *L. Ed.*2d at 613; *see*

also Donovan v. Dewey, 452 *U.S.* 594, 598-600, 101 *S. Ct.* 2534, 69 *L. Ed.*2d 262, 268-270 (1981); *United States v. Biswell,* 406 *U.S.* 311, 316, 92 *S. Ct.* 1593, 1596, 32 *L.Ed.*2d 87, 92 (1972); *Colonnade Corp. v. United States,* 397 *U.S.* 72, 76-77, 90 *S. Ct.* 774, 776-77, 25 *L.Ed.*2d 60, 64 (1970).

> Because the owner or operator of commercial premises in a "closely regulated" industry has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search . . . have lessened application in this context. Rather, we conclude that, as in other situations of "special need," . . . where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment.
>
> This warrantless inspection, however, even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as three criteria are met. First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. . . .
>
> Second, the warrantless inspections must be "necessary to further [the] regulatory scheme.". . .
>
> Finally, "the statute's inspection program, in terms of the certainty and regularity of its application [must] provid[e] a constitutionally adequate substitute for a warrant." [*Donovan v. Dewey*, 452 *U.S.* at 603, 101 *S. Ct.* at 2534, 69 *L. Ed.*2d 272]. In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. . . . To perform

> this first function, the statute must be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan v. Dewey*, [452 *U.S.* at 600, 101 *S. Ct.* at 2539, 69 *L. Ed.*2d at 270]. In addition, in defining how a statute limits the discretion of the inspectors . . . it must be "carefully limited in time, place, and scope." *United States v. Biswell*, [406 *U.S.* at 315, 92 *S. Ct.* at 1596, 32 *L. Ed.*2d at 92].
>
> [*New York v. Burger, supra*, 482 *U.S.* at 702-703, 107 *S. Ct.* at 2643-44, 96 *L. Ed.*2d at 613-14.][4]

Under *Burger*, police officers can conduct a warrantless search of a junkyard to look for stolen vehicles and parts after the owner indicates he has no license or records which are required by statute. Similarly, the search of a doctor's office "during business hours" (as here limited by the September 25, 1997 demand) for professional records needs no warrant under the test announced by the *Burger* majority. Inspections by the Division of Consumer Affairs for outdated medication or records relating to dispensing of same following receipt by the Board of Medical Examiners of evidence of such dispensing and the Board's specific authorization of a search to ascertain if the doctor was dispensing such medication (as was ordered in this case) cannot be deemed *per se* unlawful. Whether there is sufficient evidence before the Board, whether its findings are sufficiently made of record and whether the administrative demand is sufficiently tailored in terms of time, place and scope, *see Burger, supra*, 482 *U.S.* at 703, 107 *S. Ct.* at 2644, 96 *L. Ed.*2d at 614; *United States v. Biswell*, 406 *U.S.* 311, 315-16, 92 *S. Ct.* 1593, 1596, 32 *L. Ed.*2d 87, 92 (1972), depends upon the facts of the particular

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[4] There is no claim that the New Jersey Constitution gives greater protection than the federal constitution or that there is some independent state law governing administrative searches. *See, e.g., In re Martin*, 90 *N.J.* 295, 310-14 (1982).

case. As this case is moot, we need not address whether the demand in this case was too broad.

We read nothing in *Burger* or the other United States Supreme Court cases which prohibit the legislature from delegating to an administrative agency the authority to adopt regulations which satisfy the constitutional three prong test announced in *Burger*. *See, e.g., State v. Turcotte*, 239 *N.J. Super.* 285, 294 (App. Div. 1990); *State v. Dolce*, 178 *N.J. Super.* 275, 284-85 (App. Div. 1981) (finding that the administrative regulations do not violate Fourth Amendment standards). *See also In re Martin*, 90 *N.J.* 295, 310-14 (1982).[5] The Board of Medical Examiners has now adopted regulations which make clear that maintenance and dispensing of outdated drugs is prohibited, and the Legislature has expressly authorized "inspect[ion of] any premises" of a licensed professional for "any act or practice declared unlawful by a statute or regulation administered by such board." *N.J.S.A.* 45:1-18(c) alteration added).[6] Hence, where the Board finds a specific violation of a regulation by a provider of health care services under its jurisdiction has occurred, or that there is a factual basis "in the public interest to inquire whether any such violation may exist," a sufficiently detailed administrative demand (or warrant) specifying the legal authority for the demand and its limitations as to time, place and scope would pass constitutional muster.[7] *See, e.g., Greenblatt v. New*

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[5] We find nothing in *Burger* or any other case which requires the statute to be profession-specific or which requires that a statute must relate specifically to a single profession, provided that the Legislature has delegated regulatory power to the agency which conducts an administrative search. We do not herein address the power of any other agency affected by *N.J.S.A.* 45:1-18 to conduct an administrative search.

[6] Thus, the statute puts the regulated industry on notice of the ability to conduct an administrative search. *See Donovan v. Dewey, supra*, 452 *U.S.* at 605-06, 101 *S. Ct.* at 2541-42, 69 *L. Ed.*2d at 273. *See also, e.g., State v. Stroger*, 97 *N.J.* 391, 403 (1984), *cert. denied*, 469 *U.S.* 1193, 105 *S. Ct.* 971, 83 *L. Ed.*2d 974 (1985).

[7] The statute would have to be honored; only the Board can authorize the search and only Division of Consumer Affairs or Attorney Gen-

Jersey Bd. of Pharmacy, 214 *N.J. Super.* 269, 276-77 (App. Div. 1986) (rejecting a claim that "warrantless search and seizures permitted by *N.J.S.A.* 45:14-15 and *N.J.S.A.* 45:1-18c, d and e are violative of the Fourth, Fifth and Fourteenth Amendments to the federal constitution").

As the matter before us is moot by virtue of both the lack of sanctions in this case and adoption of a new regulation governing the conduct in question, we do not address the propriety of the September 30, 1997 and October 30, 1997 visits to Dr. W.C.'s office and the events surrounding them. We recognize that plaintiff's complaint seeks relief under 42 *U.S.C.* § 1983, that such claims may be cognizable in the Law Division, and that the parties have not addressed the impact of our conclusion on that aspect of the case. We, therefore, remand the matter to the Law Division, Essex County, for any further proceedings plaintiff W.C. may endeavor to pursue on the § 1983 claim which technically remains pending. *See Maisonet v. Department of Human Serv.*, 140 *N.J.* 214, 226-28 (1995). In so doing, we recognize the limited ability to proceed against State officials under § 1983, *see, e.g., Hafer v. Melo*, 502 *U.S.* 21, 25-31, 112 *S .Ct.* 358, 116 *L. Ed.*2d 301, 309-13 (1991), and do not intimate any view on the ability to proceed or on the merits of any claim.

So ordered.

I hereby certify that the foregoing is a true copy of the original on file in my office.

EMILLE R. COX
Clerk

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eral enforcement officers could conduct it. The warrantless search would be conducted to assure compliance with the provisions of Title 45 and its implementing regulations, not to gather evidence of crime, *State v. Williams*, 84 *N.J.* 217, 222-27 (1980), even though the discovery of evidence of crime during an otherwise valid administrative inspection need not necessarily be suppressed. *State v. Rednor*, 203 *N.J. Super.* 503, 507-09 (App. Div. 1985). *See also State v. Stroger, supra*, 97 *N.J.* at 403-04, 410-13

(2)

No. 99-1131

In the

Supreme Court of the United States

Supreme Court, U.S.
FILED
FEB 2 2000
CLERK

THE MEDICAL SOCIETY OF NEW JERSEY; and W.C., M.D.,

Petitioners,

v.

BERNARD ROBINS, M.D., individually and in his official capacity as President of the New Jersey State Board of Medical Examiners; ELEANOR BERNSTEIN, individually and in her official capacity as a Deputy Attorney General of the State of New Jersey; THE NEW JERSEY BOARD OF MEDICAL EXAMINERS; THE DIVISION OF CONSUMER AFFAIRS OF THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY; THE DIVISION OF LAW OF THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY; THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY; THE STATE OF NEW JERSEY; and "JOHN & JANE DOES 1-20", whose real identities are at this time unknown to the plaintiffs,

Respondents.

On Petition For a Writ of Certiorari to The Supreme Court of The State of New Jersey

BRIEF IN OPPOSITION

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2 OPP

THE QUESTION PRESENTED FOR REVIEW

WHETHER CERTIORARI SHOULD BE DENIED WHERE THE APPELLATE DIVISION CONCLUDED ON THE PRINCIPLES ENUNCIATED BY THIS COURT IN *NEW YORK V. BURGER* THAT THE NEW JERSEY BOARD OF MEDICAL EXAMINERS, AFTER A FULL EVIDENTIARY HEARING AND ACTING PURSUANT TO A COMPREHENSIVE REGULATORY SCHEME WHICH CLOSELY REGULATES THE PRACTICE OF MEDICINE, PROPERLY ORDERED THAT A WARRANTLESS ADMINISTRATIVE INSPECTION BE MADE OF A LICENSEE'S OFFICE, INCLUDING DRAWERS AND CABINETS WHERE OUTDATED MEDICATIONS MIGHT BE STORED AND WHERE, PRIOR TO THE ORDERED INSPECTION, LIMITED JUDICIAL REVIEW WAS AFFORDED BY WAY OF STAY APPLICATION AND NO PROPERTY DEPRIVATION WAS VISITED UPON THE LICENSEE BY THE BOARD'S ACTION.

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COUNTERSTATEMENT OF THE CASE

On June 26, 1997, the New Jersey State Board of Medical Examiners (hereinafter "Board") directed that an inspection of the office of W.C., a physician licensed by the Board, be performed following its receipt and review of a patient complaint which alleged that W.C. had dispensed outdated prescription legend drug medications and had also failed to issue a detailed report. For that conduct the Board issued a private letter cautioning that W.C.'s staff may be dispensing outdated medications. (Ra3)[1]

On October 30, 1997, Board investigators went to W.C.'s office during regular business hours, presented her with a Demand for Inspection signed by a Deputy Attorney General and began an inspection of the receptionist area.[2] After

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[1] "Ra" refers to the appendix filed in the Superior Court, Appellate Division, the proceeding below, on behalf of the respondents.

[2] The New Jersey statutory provision upon which the Board's inspection was predicated states in pertinent part:

> Whenever it shall appear to any board, the director or the Attorney General that a person has engaged in, or is engaging in any act or practice declared unlawful by a statute or regulation administered by such board, or when the board, the director or the Attorney General shall deem it to be in the public interest to inquire whether any such violation may exist, the board or the director through the Attorney General, or the Attorney General acting independently, may exercise any of the following investigative powers:
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> * * *
>
> c. Inspect any premises from which a licensed profession or occupation is conducted;
>
> d. Examine any goods, ware or item used in the rendition of any professional or occupational service;
>
> e. Examine any record, book, document, account or paper maintained by or for any professional or occupational

opening a single cabinet door, the investigator was told by W.C. that, on advice of her counsel, cabinet doors and drawers could not be opened. The door to the cabinet was immediately closed by the investigator without observation as to its contents. (Ra26, fn 11, 29) Upon advising W.C. that the inspection could not be performed without access to cabinets and drawers, W.C. telephoned her attorney who advised the investigator that any inspection must be limited to that which was in plain view within the office. The investigators then performed a brief walk-through of the office during which two (2) bottles of topical antiseptics or sterilizing solutions, Betadine and Cidex, containing expiration dates of 1982 and September 1997 respectively, were observed. (Ra29) No observations of patient files or other office records were attempted or made. (Ra30)

On November 3, 1997, the Board, on the Attorney General's complaint, ordered W.C. to show cause why she should not be disciplined for failing to cooperate in the Board's inspection. The complaint alleged that W.C.'s "plain view" limitation and prohibition of full access to her office violated a Board regulation requiring licensees to cooperate in investigations by making their premises, records and related goods available for inspection.[3]

> licensee in the regular course of practicing such profession or engaging in such occupation .... [N.J.S.A. 45:1-18].

[3] The uniform regulation, adopted by all professional licensing boards within the New Jersey Division of Consumer Affairs, provides in pertinent part:

> A licensee shall cooperate in any inquiry, inspection or investigation conducted by, or on behalf of, a board ... into a licensee's conduct .... A licensee's failure to cooperate, absent good cause or *bona fide* claim of a privilege not identified in N.J.A.C. 13:45C-1.5 as unavailable, may be deemed by the board ... to constitute professional or occupational misconduct within the meaning of N.J.S.A. 45:1-21(e) ... and thus subject

Following a full evidentiary hearing before the Board in which the petitioners advanced various constitutional and State statutory defenses, the Board issued a Final Decision and Order dated December 25, 1997.[4] The Board found that W.C.'s refusal to permit inspection of her office records and goods, including items contained in cabinets and drawers, constituted a failure to permit an inspection and examination of premises, goods and records maintained in the regular course of the practice of medicine and surgery, and, as such, violated the Duty to Cooperate regulation and constituted professional misconduct under State law. (N.J.S.A. 45:1-21(e)). (Ra30) Based upon these findings the Board ordered

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a licensee to disciplinary action pursuant to N.J.S.A. 45:1-21(h) ....

And further:

> (a) The following conduct by a licensee may be deemed a failure to cooperate and, therefore, professional or occupational misconduct or other good cause or grounds for suspension or revocation of licensure:
>
> 4. The failure ... to provide access to any premises from which a licensed profession or occupation is conducted. Included within this paragraph shall be the failure to ... permit the examination of any goods, ware or item used in the rendition of the professional or occupational service and the failure to grant access to records, books or other documents utilized in the practice of the occupation or profession. [N.J.A.C. 13:45C-1.3(a)4].

Violation of a Board regulation may subject a licensee to disciplinary action under New Jersey's Uniform Enforcement Act (N.J.S.A. 45:1-21(h)).

[4] Petitioner, Medical Society of New Jersey was permitted to intervene and present limited legal arguments challenging the complaint.

a new inspection to be conducted not later than January 8 and directed W.C. to fully cooperate in the inspection by permitting access to:

> ... the books, records, documents, equipment and other items in her office maintained for the practice of medicine. The inspection shall include but not be limited to items located in her drawers and cabinets of the office. (emphasis added)

The Board's order further provided that items deemed "personal" or which were subject to a good faith belief as being within an attorney-client privilege could be withheld upon identification to the Board. (Ra31) A civil penalty of $1,000 was also imposed, payment of which was stayed conditioned upon W.C.'s compliance with the ordered access. No suspension of licensure was ordered, and the Board's action was not reported to the National Practitioner's Data Bank. (Ra30-31)

Prior to the date of the ordered inspection, petitioner attacked the Board's order by filing a complaint in a State trial court alleging violation of 42 U.S.C. §1983. (Pb7) On transfer of that action to the Superior Court, Appellate Division, petitioners sought a stay of the Board's order. Within that application petitioners filed a brief in which essentially the same constitutional arguments advanced here were asserted and rejected by the Court. (Pbrf., Ra136, 7) Interlocutory review of that decision was denied in the Supreme Court of New Jersey.[5] A 20 minute inspection was thereafter conducted on February 6, 1998 which disclosed no additional outdated medications. (Pa6-7)

On June 2, 1999, the Superior Court, Appellate Division, dismissed petitioners' appeal as moot for want of disciplinary sanctions or civil penalty exaction given W.C.'s ultimate

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[5] The District Court dismissed petitioners' complaint for want of jurisdiction.

compliance with the Board ordered inspection and the Board's adoption of a new regulation prohibiting the maintenance of outdated medications by licensees.[6] The Court also remanded the matter to the trial court for further proceedings on petitioners' 42 U.S.C. §1983 complaint. In so holding, the Court rejected the petitioners' central legal argument that the Board's warrantless administrative inspection violated the Fourth Amendment. It further concluded that the New Jersey statutory provision, N.J.S.A. 45:1-18, in expressly authorizing such inspections, when applied to the practice of medicine, satisfied well established precedents of both this Court and New Jersey courts, holding that in settings involving closely regulated commercial activity, substantially diminished privacy expectations are present such that given compliance with the tests articulated by *New York v. Burger,* 482 U.S. 691 (1987), a judicial warrant is not required for administrative inspections of closely regulated activities.

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[6] The regulation was not in effect at the time of the inspection (Pa3, fn3). The Board in its decision found that maintaining and dispensing substantially outdated medications deviated from appropriate standards of medical care. (Ra18, fn)

REASONS FOR DENYING THE WRIT

THE CENTRAL CONSTITUTIONAL ISSUE IN THIS CASE INVOLVED NOTHING MORE THAN THE APPLICATION OF WELL ESTABLISHED FOURTH AMENDMENT PRECEDENT OF THIS COURT HOLDING THAT WARRANTLESS ADMINISTRATIVE SEARCHES MAY BE AUTHORIZED IN CLOSELY REGULATED COMMERCIAL ACTIVITY AFFECTING THE PUBLIC INTEREST. SINCE THE APPELLATE DIVISION CLEARLY APPLIED THE STANDARDS ARTICULATED IN *NEW YORK V. BURGER* CORRECTLY AND GIVEN THE FACTS PRESENTED, FURTHER REVIEW BY THIS COURT IS NOT WARRANTED.

Notwithstanding petitioners' assertions to the contrary, a review of the decision below discloses two simple and straight forward holdings: (1) on the facts presented the matter was moot under State law principles given the absence of any license suspension or other property deprivation; and (2) the Board's ordered inspection was constitutionally compliant with this Court's holding in *New York v. Burger*, 482 U.S. 691 (1987). As to the former, the issue certainly is not one for further review by this Court, and as to the latter, there simply is no question concerning the correctness of the Appellate Division's application of the controlling law as announced in *Burger*.

It should be noted preliminarily that, contrary to the repeated assertions that W.C. was unconstitutionally deprived of a judicial hearing prior to the inspection of her office, the facts plainly show that, on advice of counsel, she initially restricted the inspection to open areas and items in "plain view". Except for a fleeting momentary look which was terminated on W.C.'s direction, no further inspection of drawers or cabinets was undertaken until after the holding of an evidentiary hearing by the Board and preliminary review by the Appellate Division and the Supreme Court of New

Jersey by way of applications to stay the Board's ordered inspection.[7]

It is long established that due process is not necessarily judicial process and that administrative proceedings may afford the same due process as judicial proceedings. *United States v. Ju Toy*, 198 U.S. 253 (1905); *Crane v. Hahlo*, 258 U.S. 142 (1922); *Den et al. v. Hoboken Land and Improvement Co.*, 18 How 272, 15 L.Ed. 372 (1856). Accordingly, the assertion that a hearing was denied before an opportunity to challenge the inspection is both factually and legally devoid of merit.

More fundamentally, however, this Court has repeatedly held that due process does not always require a predeprivation hearing. Thus:

> It is now well established that "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." (auth. omitted) "[D]ue process is flexible and calls for such procedural protections as the particular situation demands. (auth. omitted) This Court has recognized, on many occasions, that where a State must act quickly or where it would be impractical to provide predeprivation process, post-deprivation process satisfies the requirements of the Due Process Clause. (auth. omitted) Indeed, in *Parrat v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct.

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[7] Within those applications petitioners submitted a brief asserting essentially the same constitutional arguments asserted here The well-established test for a stay requires that an application demonstrate (1) a likelihood of success on the merits, (2) irreparable injury absent a stay, (3) the probability of harm to others will not be greater than the harm the movant will suffer absent a stay and (4) the public interest will not be adversely affected by a stay. *Sampson v. Murray*, 415 U.S. 62 (1973); *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958); *Crowe v. DeGioia*, 90 N.J. 126 (1982).

> 1908 (1981), ... we specifically noted that "we have rejected the proposition that [due process] *always* requires the State to provide a hearing prior to the initial deprivation of property. (auth. omitted) [*Gilbert v. Homar*, 520 U.S. 924 (1997)]

And see also *F.D.I.C. v. Mallen*, 486 U.S. 230 (1988); *Barry v. Barchi*, 443 U.S. 55 (1979). Obviously, where acts or practices within a physician's office imperil patient safety (as here) or otherwise implicate important public health, safety or welfare issues, the long established principle as restated in *Gilbert* becomes operative. Accordingly, nothing novel or important exists within the context of this case to justify further review by this Court as to any claimed right as to a predeprivation hearing.

Similarly, the conclusory assertion, without elaboration, that the Appellate Division erred in applying *Burger*, affords no basis for review. Initially, as noted by the court below, this Court, for Fourth Amendment purposes, has explicitly recognized a reduced expectation of privacy by the owner of commercial premises in a closely regulated industry. Thus:

> An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. See *Donovan v. Dewey*, 452 U.S. 594, 598-99, 101 S.Ct. 2534, 2537-38, 69 L.Ed.2d 262, 268-69 (1981). This expectation is particularly attenuated in commercial property employed in "closely regulated" industries. The Court observed in *Marshall v. Barlow's, Inc.*: "Certain industries have such a history of government oversight that no reasonable expectations of privacy, see *Katz v. United States*, 389 U.S. 347, 351-52, [88 S.Ct. 507, 511-12, 19 L.Ed.2d 576] (1967), could exist for a proprietor over the stock of such an enterprise." 436 U.S. 307, 313, 98 S.Ct. 1816, 1821, 56 L.Ed.2d 305, 312 (1978).

[*New York v. Burger*, *supra*, 482 *U.S.* at 700 (emphasis added)]

Significantly, petitioners do not assert that the *Burger* threshold prerequisite of a "closely regulated" activity is not satisfied. As the court below found, there can be no doubt that the medical profession is highly regulated by virtue of licensure, education and a plethora of other State regulatory requirements. Moreover, there is nothing constitutionally unique (nor do petitioners so assert) about a physician's office for the purpose of applying the *Burger* test.[8]

Similarly, the three prong test of *Burger*, given this satisfaction of the threshold requirement, is plainly met.[9]

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[8] To the extent that patient confidentiality interests arise, the New Jersey statutory scheme accommodates the same by affording confidentiality to all information obtained during an investigation prior to the filing of an administrative complaint. N.J.S.A. 45:9-19.3.

[9] Given the presence of pervasively regulated activity, the *Burger* test requires:

> First, there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made....
>
> Second, the warrantless inspections must be 'necessary to further [the] regulatory scheme'....
>
> Finally, 'the statute's inspection program, in terms of the certainty and regularity of its application [must] provid[e] a constitutionally adequate substitute for a warrant.' (auth. omitted) In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that a search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. (auth. omitted) To perform this function, the statute must be 'sufficiently

Thus, there can be no question that the State has a substantial governmental interest in regulating physicians to ensure the providing of lawful, safe, proper and effective medical services to the public. The State's "paramount" obligation to protect the public's general health, is clear. Similarly, a warrantless inspection is both necessary and rationally related to the effective implementation of the regulatory scheme. Prompt and unfettered office inspections and visitations are obviously necessary to investigate complaints; to determine cleanliness and safe operation (including the providing of medications and the use of medical solutions within presumptively safe and effective periods following manufacture); to determine whether individuals are properly licensed to provide regulated health care services; and to determine whether any of a myriad of other unlawful acts have occurred or may occur which directly implicate the public's health, safety and welfare.

A warrant requirement would foreseeably impair prompt investigative responses thereby inhibiting effective enforcement activity. Given such considerations, and where, as here, the protection afforded by a warrant would be "negligible," this Court has held the Fourth Amendment's warrant requirement to be inapplicable. *New York v. Burger*, *supra* 482 U.S. at 710.

Finally, the statutory scheme as implemented by the Board's Duty to Cooperate regulation (N.J.A.C. 13:45C 1.2, 1.3(a)(4)) and in this case, its Final Decision and Order, clearly constitute an adequate substitute for a warrant. Thus,

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> comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes. (auth. omitted) In addition, in defining how a statute limits the discretion of the inspectors ... it must be 'carefully limited in time, place, and scope.' (auth. omitted) [*New York v. Burger*, *supra*, 482 U.S. at 702-703]

N.J.S.A. 45:1-18(c), (d) and (e) and the Board's regulation put licensees on clear notice that State investigation by inspection of premises and the examination of goods and records used in the course of practicing the licensed activity may be expected where a violation of a statute or regulation has occurred or where it may be in the public interest to inquire whether such an unlawful act may exist. Since the statute when read on its face and, as applied by the Court below, plainly passes constitutional muster under *Burger* and given the absence of any articulated reason by petitioner to the contrary, the decision below requires no further review by this Court.

Petitioners advance a fusillade of bald assertions which seriously misstate prior holdings of this Court or certain facts within the proceedings below. Most clearly in this regard is the assertion that the only setting in which the Constitution does not compel a warrant is where Congress has determined that a "notorious industry" requires warrantless searches to further a regulatory scheme. (Pb13) Never has this Court articulated such a test, and the holding in *Burger*, as well as other cases, makes clear that the analytical touchstone in warrantless inspections and searches is whether a "special need" arises, as reflected by a setting where the privacy interests of the owner of property are diminished and the government interests in regulating particular businesses are concomitantly heightened. *New York v. Burger, supra* 482 U.S. at 702. *See also Veronica School District 47 J. v. Acton*, 515 U.S. 646 (1995) (student drug testing as condition for participation in athletics held "special need"); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (drug testing for federal railroad employees held "special need") (1989); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (search of probationer's home authorized by state agency regulation held "special need"). So too here. New Jersey's long established regulatory scheme for the practice of medicine adopted by statute and administrative regulations implicate highly regulated activity centered in licensure and ongoing oversight in order to protect the public's health, safety and welfare.

The court's decision below in applying *Burger* recognizes this principle and is completely consistent with the decisions of this Court which have sustained warrantless searches.

Similarly, petitioners' assertion that the holding in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) dealt with a "nearly identical" regulatory scheme to that involved here is patently erroneous. In *Marshall*, unlike the focused statutory enactment here which operates only within discreet regulated professions and occupations, the federal act (OSHA) provided for warrantless inspections of all businesses engaged in interstate commerce. Further, pursuant to administrative regulation, field inspections were authorized with local inspectors empowered to determine what businesses were to be inspected and when. The federal act did not, as here, involve a single pervasively regulated industry, and warrantless searches were found unreasonable primarily due to the unbridled discretion vested in the field inspector.

No such parallel exists here. The New Jersey regulatory scheme and the facts presented here reflect a statutory requirement that reasonable suspicion be found by high level state officials as a predicate for any inspection of a licensee's premises (N.J.S.A. 45:1-18(c)). That is precisely what occurred here, for when all is said and done, the primary operative facts involve nothing more than the State's licensing agency directing an inspection of a licensee's office after receipt of a patient complaint indicating the dispensing of outdated medications, later buttressed by investigator "plain view" observations of two additional outdated antiseptic substances in the licensee's office. This setting, as held by the court below, entails precisely the type of special need which this Court in *Burger* and its progeny have recognized in sustaining warrantless administrative searches against Fourth Amendment challenges. Accordingly, the narrow exception urged by petitioners provides no basis for further review by this Court.

Equally unavailing is the assertion of impropriety arising from the Attorney General's performing both a prosecutorial

and counseling function in the Board's disciplinary proceeding. Initially, petitioner fails to point out that under New Jersey statutes, the Attorney General is required to act as the sole legal adviser to State administrative agencies and to provide legal services in relation to litigation involving such agencies. N.J.S.A. 52:17A-4(c), (e). Further, petitioners neglect to advise the Court that separate deputy attorneys general performed the counseling and advisory functions in the Board proceeding and are subject to separate and distinct supervisory lines of authority with internal administrative safeguards in place to ensure independence and separation in the performance of the respective functions. Finally, of course, it is long established that the merger of functions within State administrative agencies, absent a showing of impropriety, does not *per se* effect a due process deprivation and that State licensing boards are entitled to a presumption of good faith when engaged in administrative decision-making in disciplinary proceedings. *Withrow v. Larkin*, 421 U.S. 35, 43, 55 L.Ed.2d 712, 728, 95 S.Ct. 1456, 1468 (1975). Nothing in the facts of this case or the law established to date by this Court supports any claim of impropriety sounding in merger of functions so as to warrant further review here.

The assertion that the Board's directed and ordered inspections were overbroad is also plainly without merit. Each element of both the initial Demand for Inspection and the Board's Final Order therefor was rationally related to a legitimate investigative need. Thus, licenses on W.C.'s premises would permit a determination of whether individuals dispensing medications, outdated or otherwise, were properly authorized by law to do so; records would identify who may have received outdated medications, when, and why, and what, if any, charges therefor were made; and access to equipment maintained in the office would disclose where outdated medications may have been stored. Petitioners' assertions notwithstanding, the Board's Final Order explicitly excepted from inspection any documents deemed confidential or privileged and subjected such documents to further Board

scrutiny, (Ra31) which ultimately was unnecessary given the brief and uneventful final inspection. In short, the claimed overbreadth urged by petitioners as a basis for further review, wholly apart from the absence of any cited prior authority of this Court indicating Fourth Amendment impropriety, is simply without factual support in the record below. Accordingly, review by this Court is not warranted.

CONCLUSION

For the above stated reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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